

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



74-2485

To be argued by  
SHELDON D. CAMHY

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

INTERNATIONAL CONTROLS CORP.,  
*Plaintiff-Appellee,*

*vs.*

ROBERT L. VESCO,  
*Defendant,*  
*and*

VESCO & Co., INC.,  
*Intervenor-Appellant.*

CIVIL ACTION—ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK  
SAT BELOW: HON. CHARLES E. STEWART, JR., U.S.D.J.

**BRIEF OF APPELLEE**

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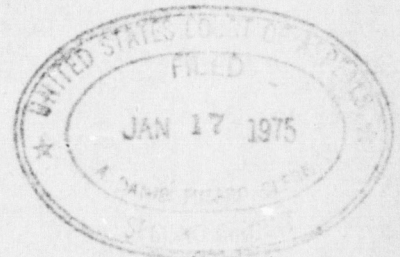


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ISSUE PRESENTED

Did the District Court correctly deny Vesco & Co., Inc. leave to intervene as of right as a defendant in an action against Robert L. Vesco, where Vesco & Co., Inc.'s only claim of interest was based on the fact that it has been preliminarily found, in a previous and separate action, to hold assets of Robert L. Vesco as his "alter ego," which assets might be subject to execution of a judgment against Robert Vesco?



### STATEMENT OF THE CASE

This is an appeal by Vesco & Co., Inc. ("Vesco & Co.") from an order entered on October 8, 1974 in the United States District Court for the Southern District of New York (Honorable Charles E. Stewart, Jr.) denying a motion by Vesco & Co. for leave to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

By a complaint filed April 8, 1974, International Controls Corp. ("ICC") commenced this action against the defendant Robert L. Vesco. (3a)\* The complaint alleged violations of the federal securities laws, fraud and breach by the defendant of his fiduciary duty to plaintiff in connection with transactions in the shares of Empire Financial Corporation.\*\* After service of process upon him pursuant to Court order Robert L. Vesco failed to file an answer or otherwise appear in the action. However, on May 15, 1974, Vesco & Co. filed a notice of motion for leave to intervene as a defendant. The basis of that motion was that in prior litigation the District Court had preliminarily enjoined Vesco & Co. from transferring certain property which it had received from Robert Vesco upon the ground that said property appeared

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\* Unless otherwise noted, all references are to the Appendix of Appellant.

\*\* An earlier case having the same title as the instant case but involving different claims and transactions is pending in the District Court under Index No. 73 Civ. 2518 and was the subject of an opinion of this Court. 490 F. 2d 1334 (1973). (See discussion, p. 2)

to be the property of Robert Vesco and to be necessary to satisfy or implement the Court's judgment against Robert Vesco. Plaintiff ICC opposed the motion to intervene in the instant action. After argument (15a), the District Court denied the motion to intervene by the order appealed from. In the interim, on September 11, 1974, judgment was entered against Robert Vesco by default.

Vesco & Co. contends that the District Court's preliminary finding, affirmed by this Court, in International Controls Corp. v. Robert L. Vesco, et al., 490 F. 2d 1334 (2d Cir. 1974), cert. den. sub. nom., Vesco & Co., Inc. v. International Controls Corp., 417 U.S. 932, 41 L. Ed. 2d 236 (1974), that Vesco & Co. is the "alter ego" of Robert Vesco which is holding property which is or may be the property of Robert Vesco, necessitates the granting of its motion to intervene and defend the complaint in the instant case.

ICC contends that the previous finding that Vesco & Co. is Robert Vesco's "alter ego" is in no way inconsistent with the denial of Vesco & Co.'s motion to intervene here and that the attempted intervention is merely a blatant effort to permit Robert Vesco to defend, through the use of a "dummy," a suit in which he has defaulted.



Vesco & Co. suggests that ICC's failure to join Vesco & Co. in the instant motion was "simply an attempt to avoid any contest on the merits of the complaint." (Appellant's Brief, p. 11) We submit that the suggestion that Vesco & Co. should have been named as a defendant in the complaint in this action is outrageous. We know of no theory on which ICC could have joined Vesco & Co. as a defendant in this action since the complaint is based wholly on transactions which are alleged to have occurred in 1968 and 1969 (4a-5a) and in which Vesco & Co. was in no way involved. Vesco & Co. was not even in existence until July, 1972, fully three years later. (41a) ICC has not, and indeed could not, seek to hold Vesco & Co. liable on the basis of the allegations of the complaint in this action.

Vesco & Co. has sought intervention solely on the ground that ICC may seek to levy upon assets held by Vesco & Co. to satisfy a judgment in this action against Robert Vesco. ICC contended below (25a-26a), and contends here, that if it attempts to levy upon Vesco & Co.'s assets, it will do so solely on the basis of its claim that said assets are in fact the property of Robert Vesco. Thus, the only question which can properly concern the proposed intervenor is whether or not the assets it holds are really Robert



Vesco's and hence available to satisfy a judgment against him. The question of Robert Vesco's substantive liability to ICC arising out of transactions set forth in the complaint is clearly a separate one in which Vesco & Co. has no legitimate interest.

The matter of the true ownership of Vesco & Co.'s assets is clearly a question which can and should be separately litigated when, and if, the question arises of satisfying the judgment against Robert Vesco in the present case out of assets held by Vesco & Co.

## ARGUMENT

### I

APPELLANT HAS NO CONNECTION WHATEVER WITH THE TRANSACTIONS ALLEGED IN THE COMPLAINT AND ITS ALLEGED INTEREST AS ROBERT VESCO'S "ALTER EGO" IS INSUFFICIENT TO SUPPORT INTERVENTION AS OF RIGHT

Appellant, Vesco & Co., is not mentioned in the complaint in the instant case. In fact, Vesco & Co. was not even incorporated until July, 1972 (41a), more than three years after the transactions alleged in the complaint.

Appellant uses as its purported reason for moving to intervene here the fact that this Court has found it to be the "alter ego" of defendant Robert Vesco in another case. Vesco & Co. states that it, therefore, wishes to intervene here as a protective measure in light of that finding. (Appellant's Brief, pp. 7-8). Vesco & Co. contends that its "interest" in the present case arises from its desire to protect what it alleges to be its property from the possibility of a judgment being obtained against Robert Vesco.

Appellant places great reliance upon the Supreme Court's decision in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U. S. 129, 17 L. Ed. 2d 814 (1967).



Appellant quotes extensively from that opinion to support its contention that Rule 24(a) regarding intervention should be broadly construed. Accepting for purposes of argument Appellant's own statement of the broad view of the Cascade case set forth on page 8 of its Brief, its application must fail since Vesco & Co. neither has nor "claims an interest relating to the property or transaction which is the subject of the action." The property and transactions which are the subject of the action (Empire Financial stock purchased and resold by Robert Vesco in 1968 - 1969) in no way relate to Vesco & Co., a corporate vehicle organized by Robert Vesco years later and into which he placed his stock in plaintiff ICC.

It should be noted that comments on the Cascade decision which appear in later opinions of the lower Courts indicate that it has not been accepted as a mandate for indiscriminate intervention. For example, in United States v. Paramount Pictures, Inc., 333 F. Supp. 1100 (S.D.N.Y. 1971), aff'd sub nom. Syufy Enterprises v. United States, 404 U. S. 802 (1971), the Court noted:

"... One cannot avoid the impression that the Supreme Court was motivated by the long three-year delay following its divestiture decree. During this period nothing was accomplished. The lack of diligence in fulfilling its mandate was apparent. It was

undoubtedly the cause for the grant of intervention. The unusual facts of Cascade make it sui generis." (At p. 1102, Emphasis Added.)

See also: Smuck v. Hobson, 408 F. 2d 175, 179, Fn. 16 (U.S. App. D. C. 1969) and Moore v. Tangipahoa Parish School Board, 298 F. Supp. 288, 291, Fn. 4 (E.D. La. 1969). In view of the opinions expressed in these later decisions, we suggest that Appellant's reliance on the authority of Cascade is misplaced.

In General Motors Corporation v. Burns, 50 F.R.D. 401 (D. C. Hawaii 1970), the opinion of the Court included a discussion of the standards which must be met in order to justify intervention as of right under Rule 24(a). The Court stated that an applicant for intervention must show that he has sufficient interest in the property or transaction which is the subject of the action; that that interest is in danger of practical impairment; and that he is inadequately represented by present parties. We submit that in the instant case Vesco & Co. fails to meet any of these requirements.

In Arvida Corporation v. City of Boca Raton, 59 F.R.D. 316 (D.C.S. D. Fla. 1973), the Court pointed out that there were two aspects to the "interest" requirement, i.e.:



"(1) an interest related to the lawsuit, and (2) even if related, the interest must be a direct and substantial interest." (At p. 321)

The Court went on to state that:

"... an applicant for intervention seeking to interpose a defense to pending litigation must also possess standing to assert that defense. In determining whether an individual has standing in this instance, the Court must focus upon the party seeking intervention to ascertain whether he is a proper party to the adjudication of the issues in the lawsuit. Additionally, the substantive issues must be examined to determine whether there is a 'logical nexus' between the status asserted by the applicant and the claim sought to be adjudicated." (At p. 321)

It is abundantly clear that in the instant case the mere fact that Vesco & Co. is holding Robert Vesco's property provides no such "logical nexus" between it and the Empire Financial claim set forth in the complaint. As stated above, the only question which concerns Vesco & Co. is whether or not its assets are its own or those of Robert Vesco. Certainly that question may be adjudicated when, and if, it arises on an attempt to execute on said property.

Appellant in its brief attempts to liken itself to a surety for Robert Vesco. It suggests that it should, therefore, have the same right to contest Robert Vesco's



liability that it would as a surety whose principal has defaulted. Appellant cites several cases for the proposition that a surety may raise any defense available to its principal, which proposition we do not dispute. However, Appellant's attempted analogy is highly inapposite. We see no possible way in which Vesco & Co. could be prejudiced by the judgment obtained against Robert Vesco. Since the judgment obtained does not run against Vesco & Co. per se, its only possible involvement may be as the holder of assets belonging to Robert Vesco. If Vesco & Co. wishes to litigate the source or ownership of assets it now holds, it may do so if and when such assets are levied upon. The foregoing situation is quite different from that of a surety who would have an in personam liability on the underlying claim payable out of its own property irrespective of whether it was holding property of its principal.

II

THE DENIAL OF THE MOTION TO INTERVENE  
SHOULD BE AFFIRMED IN VIEW OF THE AP-  
PARENTLY IMPROPER MOTIVE OF APPELLANT

It appears to us that the proposed intervention was in fact a device by which defendant Robert Vesco sought to defend through a "front" while at the same time declining to submit himself to the jurisdiction of the District Court.

The cases most in point are those which have denied intervention on the basis that such intervention would constitute a "sham," or, at the least, a distortion of the Federal Rules for the convenience of a party. In Kozak v. Wells, 278 F. 2d 104 (1960), the Eighth Circuit found that a motion to intervene was proper, but the Court's opinion considered the motivation of the movant and stated:

"We recognize, of course, that courts must be on guard against the improper use of the intervention process." (At p. 113)

Again, in Edmondson v. State of Nebraska, 383 F. 2d 123 (1967), the Eighth Circuit affirmed the denial of a motion to intervene after noting that the intervention had "the earmarks of a sham," and stated approvingly that "When



improper motive in seeking intervention appears, the trial court should be wary to grant the request." (At p. 128)

In the instant case, defendant Robert Vesco has been unwilling to appear in the litigation. He attempted to forestall the effect of his default by interposing Vesco & Co. as a defendant. No claim in personam is made against Vesco & Co. It would have no relation whatever to this case were it not holding some of Robert Vesco's property. The judgment herein was against Robert Vesco, not against Vesco & Co. and will have no effect on any property of Vesco & Co. unless and until plaintiff attempts to satisfy its judgment by levying upon its assets. Even then, the only assets affected will be those found to be Robert Vesco's and not Vesco & Co.'s after that issue is litigated with Vesco & Co.

It is respectfully suggested that the only possible conclusion which one can draw from the situation presented by Robert Vesco's default and Vesco & Co.'s attempted intervention in a controversy in which it is not involved is that the intervention is a ruse to permit Robert Vesco to defend this suit while keeping personally clear of the jurisdiction of the District Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the order appealed from should be affirmed.

Respectfully submitted,

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